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NO. 83-1086

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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STATUTES AND RULES INVOLVED

FEDERAL:

Federal Rules of Appellate Procedure

Title 28 USC 2101(c)

STATE:

Civil Practice Law and Rules

Tax Law: §200
§375
§690
§1090
§1138
§1147

REGULATIONS AND RULES:

Federal Rules of Appellate Procedure

Code of Rules and Regulations
of the State of New York,
Vol. 22 Judiciary (A)

OTHER AUTHORITIES:

Weinstein, Korn, Miller "New York Practice"

SUPPLEMENTAL STATEMENT OF CASE

The actual determination fixing the amount of taxes, interest and penalties was dated November 12, 1981.

POINT I.

THE NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT WERE TIMELY FILED.

Title 28 USC 2101(c) provides that review shall be "...taken or applied for within 90 days after the entry of (such) judgment or decree" and Rule 500.13 of the Rules of the New York Court of Appeals provides that:

> "The remittitur of the Court, containing this Court's adjudication, together with the return papers filed with the Court, shall be sent to the clerk of the court of original instance or to the clerk of the court where the case is remitted, there to be proceeded upon according to law. Any order to be made and entered to effect the adjudication contained in

> this Court's remittitur, including an award of costs, is made, entered and enforced in the court of original instance or in the court where the case is remitted."

Nothing on the face of the New York Court of Appeals order granting appellees' motion to dismiss, a copy of which was contained in the Appendix of appellants' Jurisdictional Statement, indicated that any entry or filing would occur in the New York Court of Appeals,

which accords with the Rules of the New York Court of Appeals to the effect that any order effecting the adjudication by the New York Court of Appeals is to be made and entered in the lower court.

Conversely, the judgment of the New York Supreme Court, Albany County, showed

on its face that it had been entered on September 29, 1983.

The above described New York Court of Appeals rule relating to entry of orders in lower courts was added January 1, 1981. See Official Compilation of Codes, Rules and Regulations of the State of New York, Vol. 22 Judiciary (A) p. 1100. This provision was not in the rules of the New York Court of Appeals in effect in 1942 when Department of Banking v. Pink, 317 US 264 (1942) arose. The relevant provision then in effect simply read:

> "Rule XVI. Remittitur. The remittitur shall contain a copy of the judgment of this court

> and the return made by the Clerk below and shall be sealed with the seal and signed by the Clerk of this Court." Clevenger's Practice Manual, 1942, Baker, Voorhis and Mathew Bender.

Clearly the 1981 change in the phrasing of the remittitur rule of the New York Court of Appeals, together with the phrasing of 28 USC 2101(c) which refers to the "entry" of a judgment or decree, created a trap for the unconversant New York practitioner. This change occurred after the statement of the rules relating to the timeliness of applications for review of state court judgments contained in Department of Banking v. Pink, supra. That case actually dealt with a different question, namely whether a motion to amend the New York Court of Appeals remittitur extended the time to appeal. The actual petition in that case was untimely even if the date of entry of the lower court judgment

controlled. Department of Banking v. Pink, supra, pp. 265-266.

In addition to this change in the rules of the New York Court of Appeals, there has been a change in federal procedural rules. As of July 1, 1968, Rule 36 of the Federal Rules of Appellate Procedure required notice of entry of judgment to be given to the parties. See Scofield v. NLRB, 394 US 423, 427 (1969). New York practice actually requires that written notice of entry of a judgment be served on the other side in order to commence the 30-day period generally allowed for appeals. New York Civil Practice Act Section 5313.

Therefore appellants respectfully request this Court to follow the less restrictive

rule of Scofield v. NLRB, supra, as well as the plain language of 28 USC Section 2101(c) which speaks of the "...entry of such judgment or decree." Surely the granting of appellees' motion to dismiss the appeal to the New York Court of Appeals constituted an "order" not a "judgment or decree" in common legal parlance. As this Court said in Puget Sound Co. v. King County, 264 US 22 (1924):

> "It is apparent that however final the decision may be, it is not the judgment. It is said that the latter is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the State, which counsel seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916, supra, fixing the time in which writs of error must be applied for and allowed."

POINT II.

THE ARTICLE 78 PROCEEDING WAS TIMELY COMMENCED.

Appellants are not seeking a review of the State Tax Commission ruling herein, but are challenging the constitutionality of the hearing procedures followed by the State Tax Commission and of the review bond requirement in sales tax cases, contained in §1138 of the Tax Law. Therefore petitioners are not bound by the "esoterica" of §1138 proceedings, including §1147(a)(2). As Weinstein, Korn, Miller "New York Practice", puts it:

> "Similarly, litigants must comply with statutory or regulatory procedures as a prerequisite to seeking judicial relief. Because the action taken under a challenged provision may be a nullity, an attack on the jurisdiction or power of an administrative board or the validity or applicability of a statute or ordinance is exempted from this limitation." Volume 3, page 30-78, paragraph 3001.09(c).

In a recent case where a real

property taxpayer was bringing a challenge outside the usual scope of Article 7 of the Real Property Tax Law the New York Court of Appeals held that the short 30 day statute of limitations provided by Article 7 did not apply, but rather the normal 4 month period applicable to Article 78 proceedings. Dudley v. Kerwick, 52 NY2d 542 (1981). The Court of Appeals, in another case, stated this rule as follows:

> "To be sure, a tax assessment may be reviewed in a manner other than that provided by statute where the constitutionality of the statute is challenged or a claim is made that the statute by its own terms does not apply (citations omitted) and where the assessment is wholly fictitious and is made without any factual basis solely to extend a period of limitations." (citations omitted). Slater v. Gollman, 38 NY2d 1, 4 (1975). (Emphasis added.)

The above cases are controlling in the present situation since, as noted, petitioners are not seeking review of a

State Tax Commission decision but are alleging unconstitutional procedures and an unconstitutional statute.

The normal rule in Article 78 proceedings is undeniably that the 4 month statute of limitations begins to run on receipt of notice. Kurtz v. Krone, 43 M.2d 573 (S.C. 1964); Tuvim v. 10 E. 30 Corp., 75 M.2d 612, (S.C.N.Y. 1971) mod. in other respects 38 AD2d 895, aff'd 32 NY2d 541; Kordal v. Niesly, 66 M.2d 781 (S.C. Nassau 1971); Ridgel v. Lavine, 77 M.2d 21 (S.C. Queens 1973) and Weinstein, Korn, Miller, op.cit., Volume 8, page 78-106, paragraph 7804.02. Appellants did commence their Article 78 proceeding 4 months after receipt of notice, as appellees must concede, because of an intervening weekend.

Additionally, since appellants are attacking the constitutionality of the

review bond requirement of §1138 of the Tax Law, appellants should not bear any of the burdens of that section, including the stricter rule of §1147 pursuant to which the 4 month Statute of Limitations begins to run on mailing of notice. As the court said in U.S. v. Heller, 635 F.R.2d 848 (Temp. Emerg. Court of Appeals, 1980):

> "...it is a violation of due process to subject to a regulation's penalties one who is judicially litigating the validity of that regulation." Page 857.

This is the reverse side of the constitutional rule which bars a litigant from retaining the benefits of a statute while attacking the constitutionality of one of its important provisions. Fahey v. Mallonee, 332 US 245, 255 (1947). If, for example, §1138 and §1147 of the Tax Law provided a statute of limitations that was 3 days longer than §217 of the Civil

Practice Law and Rules, rather than 3 days shorter as is the case herein, appellants would not be allowed to attack the constitutionality of the bond requirement of §1138 while relying on its more generous period of limitations. By the same token, appellants should not be required to bear the ancillary burdens of a statute when challenging its basic constitutional validity.

In any event, §1138(a)(4) of the Tax Law provides that an Article 78 proceeding to review a State Tax Commission decision shall be commenced within 4 months of the giving of notice of the "determination" of the State Tax Commission. (§1138(a)(4) was formerly numbered §1138(a), see L. 1979, Ch. 714, Sec. 2 and L. 1981, Ch. 760, Sec. 1, Consolidated Laws Service, Cumulative Supplement, January 1982.)

By "determination" clearly is meant a ruling which sets forth the exact amount of the sales tax liability. Thus subdivision (a)(1) of the same section prescribes that:

> "...the amount of the tax due shall be determined by the tax commission..." (Emphasis added.)

and subdivision (a)(4), which permits an undertaking rather than a cash deposit if the appellant so elects, says:

> "...such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination." (Emphasis added.)

Clearly before this 4 month period begins to run the State Tax Commission must determine the amount of taxes, penalties and interest alleged to be owing, state such amount in its determination, and give the taxpayers notice of such determination. This was not done until the communication dated November 12, 1981

was prepared and sent out to the appellants herein by the State Tax Commission. The amount of the "...taxes, penalties and interest thereon..." was finally "...stated in such determination..." as set forth in the above-quoted language of §1138.

Use of the word "determination" to describe a computation of the dollars-and-cents amount of the sales tax liability, interest and penalties in question is not unique to the statute. In fact, appellees themselves use the word in this sense, as witnessed by the deficiency notices originally mailed to the appellants herein which are referred to on their faces as "Notices of Determination," and set forth in exact figures the amount of taxes, interest and penalties claimed to be owing. By contrast, the communication which

appellees now ask be deemed a "Determination" is clearly referred to on its face as a "Decision". Similarly, the covering letter to this communication dated October 23, 1981 advises, "Please take notice of the Decision of the State Tax Commission..." (emphasis added). Appellants are told in this letter to make further inquiries should they wish to know how much tax is due.

The legislative history of these terms clearly supports appellants' position. As already mentioned, neither the personal income tax nor the corporate franchise tax sections of the Tax Law require an undertaking as a prerequisite to court review. Tax Law Sections 690 and 1090. And in each case the applicable period within which to commence such court review commenced four months after notice of decision. Sections 690(a) and

1090(a). Prior to 1963 (in personal income tax cases) and 1964 (in corporate franchise tax cases), such undertakings were required. Section 375 Tax Law and Section 200 Tax Law (McKinney's 1966). These predecessor statutes provided that the applicable period within which to commence such court review commenced four months after notice of determination. Section 375 (old Article 16) and Section 200 (McKinney's 1966 volume 59) (Article 9, compare with new Article 27). Thus the legislature substituted the word "decision" for the word "determination" at the very time the review bond requirement was dropped. As previously noted, the legislature has continued to the present to use the word "determination" with respect to court appeals in sales tax cases in which, of course, the review bond requirement has not been dropped from the statute.

Clearly this is no coincidence, and the intention throughout has been to include in the finality requirement not only a decision that the taxpayer was or was not liable but also a determination of the amount of the taxpayer's liability for taxes, interest and penalties, whenever a review bond in the amount of the taxes, interest and penalties is called for. (Corbisiero v. State Tax Commission, 82 AD2d 990, aff'd 56 NY2d 680 (1982), cited by appellees, is not at all relevant). In any event, as noted previously appellants did commence this Article 78 proceeding 4 months from receipt of the Notice of Decision itself, all that New York law requires.

While not altogether pertinent, one of the main objections appellants have raised below was the complete disregard by appellees of the 3 year statute of

limitations on sales tax deficiencies. Appellees used a wholly-artificial assessment to extend this 3 year period to 9 years. As a result, the 1980 State Tax Commission hearing in this case was a costly exercise in futility from appellants' viewpoint, dealing with sales taxes allegedly accruing as far back as 1967. After thus tearing the 3 year statute of limitations out of the law books altogether, appellees now seek to rely on much shorter periods of limitation.

POINT III.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Section 1138 of the New York Tax Law required that appellants make a cash deposit in the amount of the taxes, interest and penalties allegedly owed, approximately $92,000.00, or file an undertaking

for that amount, which, as a practical matter would require collateral in the form of marketable securities equalling 125% of the amount of the undertaking. (In this regard appeal bonds are of course different from fiduciary bonds). Appellants would have to meet this requirement for court review even though the judgment was obtained without a fair hearing. This is not a case of hardship but of impossibility. Appellants believe that no person who has not had a fair hearing at some point should be required to live out his life with a $92,000 judgment hanging over him for taxes allegedly owed by a chain of 10 retail stores.

Respectfully submitted,

LORENTZ W. HANSEN
Counsel for Appellants

Dated: January 20, 1983
White Plains, New York